

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 193

Docket No. SF-0831-10-0512-I-1

**Stephen I. Adler,
Appellant,
v.
Office of Personnel Management,
Agency,
and
Valerie B. Baker,
Intervenor.**

September 22, 2010

Stephen I. Adler, Ocean View, Hawaii, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

Valerue B. Baker, Lakewood, Wisconsin, pro se.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed in part and remanded in part the reconsideration decision by the Office of

Personnel Management (OPM) awarding his former spouse, Valerie Baker,¹ a pro rata share of his retirement benefits under the Civil Service Retirement System (CSRS). For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), AFFIRM the portion of the initial decision that found Ms. Baker is entitled to a pro rata share of the appellant's CSRS annuity, and VACATE the portion of the decision that remanded the reconsideration decision to OPM. OPM's reconsideration decision is AFFIRMED.

BACKGROUND

¶2 The appellant and Ms. Baker were married on May 19, 1972. *See* Initial Appeal File (IAF), Tab 3, Subtab 6 at 47. On April 22, 1974, the appellant joined the Federal service. *See id.* at 86, 91. On March 21, 1997, the Oconto County (Wisconsin) Circuit Court issued a judgment of divorce between the appellant and Ms. Baker, effective January 27, 1997. *Id.* at 46-65. The divorce decree provided that Ms. Baker was to receive one-half of the appellant's civil service retirement plan "to be divided between the parties by [qualified domestic relations order] QDRO." *Id.* at 54. The appellant appealed the judgment to the Court of Appeals and the Wisconsin Supreme Court, but was unsuccessful. *See id.* at 18.

¶3 The appellant retired under CSRS effective October 3, 1997. *Id.* at 83-86. On December 23, 1997, the Oconto County Circuit Court issued a certified Order With Respect to CSRS Annuity Payment/Lump Sum Credit/Survivor Annuity (Order). *Id.* at 69-71. The Order provides, in relevant part:

Employee, Stephen Irvin Adler, is or will be eligible for retirement benefits under the [CSRS] based on employment with the United States Government. [Ms. Baker] is entitled to a prorata share of

¹ For the sake of consistency, we will refer to Ms. Baker by her current name.

employee, Stephen Irvin Adler's gross monthly annuity under the [CSRS]. In calculation of the prorata share, the numerator shall be the number of months of federal civilian and military service that the employee performed during the marriage plus 24 months of military service that the employee performed prior to the marriage and whose denominator is the total number of months of federal civilian and military service performed by the employee. The marriage began on the 19th day of May, 1972. The marriage ended on January 27, 1997. [OPM] is directed to pay [Ms. Baker's] share directly to [Ms. Baker].²

Id. at 70. The record shows that the appellant has 287 months total Federal service,³ of which he performed 273 months while married to Ms. Baker. *See id.* at 87-91. Contrary to what the Order implies, the appellant has never served in the military. *Id.*; IAF, Tab 8 at 2.

¶4 Ms. Baker's attorney provided OPM with certified copies of the Order and the original divorce decree. IAF, Tab 3, Subtab 6 at 39, 68. On June 10, 1998, OPM informed the appellant that it had processed Ms. Baker's claim for the court-awarded portion of his CSRS benefit, and determined that she was entitled to 50 percent of his current gross annuity. *Id.* at 37. In reaching that result, OPM erroneously divided the appellant's *entire* 296 months of marriage to Ms. Baker by his 287 months of total Federal service and, without explanation, deemed that fraction to equal 1. *Id.* The appellant responded, arguing that the Order was labeled as a QDRO and therefore not acceptable for processing, and that Ms. Baker should instead receive a share based on his retirement contributions as of the date of the divorce. *Id.* at 35-36. OPM in turn responded that the Order awarding Ms. Baker a pro rata share was not labeled a QDRO, that it was

² The Order also purports to award Ms. Baker a survivor annuity. *Id.* at 71. However, because the Order was issued after the appellant's retirement and the original divorce decree did not award survivor benefits, OPM did not give effect to that provision. *See* [5 C.F.R. § 838.806](#); IAF, Tab 3, Subtab 2. That ruling is not at issue in this appeal.

³ This figure includes 1044 hours unused sick leave. *See* [5 C.F.R. § 838.242](#)(b).

acceptable for processing, and that if he disagreed with the method for computing the apportionment he should obtain an amended court order. *Id.* at 31. By letter dated August 31, 1998, OPM informed the appellant that it had erroneously given Ms. Baker credit for the period from May 19, 1972, to April 22, 1974. *Id.* at 22. OPM recalculated Ms. Baker's pro rata share as 47.56 percent of the appellant's current gross annuity, a figure equal to one-half of the appellant's 273 months of Federal service while married to Ms. Baker divided by his 287 months of total Federal service. *Id.* However, in explaining its calculation, OPM indicated a denominator of 296 months. *Id.* OPM did not include the appellant's non-existent military service in its computation. *Id.*

¶5 The appellant continued to pursue the matter. *Id.*, Subtabs 5, 6. On November 20, 2009, OPM again informed the appellant that the Order awarded Ms. Baker a pro rata share of his gross annuity, rather than a percentage of his contributions, and that any change to that apportionment would require an amended court order. *Id.*, Subtab 4. The appellant requested reconsideration. *Id.*, Subtab 3. On March 3, 2010, OPM issued a final decision affirming its finding that Ms. Baker was entitled to a pro rata share pursuant to the Order. *Id.*, Subtab 2.

¶6 On March 13, 2010, the appellant filed an appeal of the March 3, 2010 reconsideration decision. IAF, Tab 1. He did not request a hearing. *Id.* During the proceedings below, the appellant stated that he was contesting the validity of the Order, and reiterated the arguments he had previously advanced before OPM. Among other things, he argued that the Order was "false" because it referred to non-existent military service. The appellant further argued that he was denied his constitutional rights to due process and equal protection because he was unaware that the Order was being written and was not represented in the matter. He objected that OPM failed to address these concerns in its decisions and in its pleadings before the Board. *See* IAF, Tabs 1, 6, 8, 13, 16, 18. In addition, the appellant alleged violations of various regulations, including [5 C.F.R.](#)

[§§ 838.122](#)(a), 838.131(2), 838.221(b), 838.1004, 838.1008, and 838.1009. *See* IAF, Tab 18. The appellant made multiple requests for sanctions, all of which were denied by the administrative judge. *See* IAF, Tabs 6, 8, 13, 16, 17.

¶7 The administrative judge affirmed the reconsideration decision in part, finding that the Order was acceptable for processing and awarded Ms. Baker a pro rata share of the appellant’s retirement benefit. IAF, Tab 19 (Initial Decision, June 11, 2010). The administrative judge further found that the Board lacks jurisdiction to overturn the Order. With respect to the amount of the pro rata share, the administrative judge instructed OPM to determine on remand the correct denominator to be used in calculating the pro rata share and then issue a new reconsideration decision. *Id.*

¶8 On petition for review, the appellant reiterates his arguments from below. PFR File, Tab 1. He further contends that the initial decision is a “one sided document” and questions whether the administrative judge wrote it herself. *Id.* OPM has filed a response to the appellant’s petition, and the appellant has filed a reply to OPM’s response.⁴ PFR File, Tab 5.

ANALYSIS

¶9 The appellant has the burden of proving, by a preponderance of the evidence, that his former spouse is not entitled to the portion of his annuity benefits awarded by OPM. *See Hamilton v. Office of Personnel Management*, [114 M.S.P.R. 439](#), ¶ 14 (2010). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. [5 C.F.R. § 1201.56](#)(c)(2).

⁴ The Board’s regulations do not provide for a reply in support of a petition for review. *See* [5 C.F.R. § 1201.114](#)(d). We have therefore not considered the appellant’s reply in reaching our decision. *See Hunter v. Office of Personnel Management*, [109 M.S.P.R. 514](#), ¶ 8 n.2 (2008), *aff’d*, No. 2008-3354 (Fed. Cir. 2009) (NP).

¶10 To the extent the appellant contests the validity of the Order, he has selected the wrong forum for pursuing his challenge. OPM's regulation at [5 C.F.R. § 838.224](#) sets forth the following procedures for contesting the validity of court orders affecting lifetime annuities:

(a) An employee, separated employee, or retiree who alleges that a court order is invalid must prove the invalidity of the court order by submitting a court order that—

(1) Declares the court order submitted by the former spouse is invalid; or

(2) Sets aside the court order submitted by the former spouse.

(b) OPM must honor a court order acceptable for processing that appears to be valid and that the former spouse has certified is currently in force and has not been amended, superseded, or set aside, until OPM receives a court order described in paragraph (a) of this section or a court order amending or superseding the court order submitted by the former spouse.

The appellant has not obtained a court order declaring the Order invalid or setting it aside, and the Board, not being a court, cannot issue such an order. In any event, the Board lacks the authority to review actions by state courts. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985) (the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation).

¶11 We further find that OPM was correct in its determination that the Order is suitable for processing and awards Ms. Baker a pro rata share of the appellant's gross annuity. With respect to the apportionment of a lifetime annuity, a court order must meet the minimum requirements of 5 C.F.R. part 838 subpart C to be a court order acceptable for processing. See [5 C.F.R. § 838.103](#). The record reflects that the Order satisfies those requirements. As required under [5 C.F.R. § 838.303](#), the Order identifies the retirement system at issue and expressly states that Ms. Baker is entitled to a portion of the appellant's annuity, using terms approved under [5 C.F.R. § 838.612](#). The Order also expressly directs OPM to pay the marital share directly to Ms. Baker, thereby satisfying [5 C.F.R.](#)

[§ 838.304](#). In addition, as discussed further below, the Order provides OPM sufficient instructions to compute Ms. Baker's share as a fraction of the appellant's gross annuity. 5 C.F.R. § 838.305(b)(1)(ii); *see also* 5 C.F.R. §§ 838.306, 838.621(b). Contrary to the appellant's assertion, the Order is not improperly labeled as a QDRO, and even if it were, it would still be acceptable for processing because it refers to 5 C.F.R. part 838 and states that the provisions concerning the apportionment of CSRS benefits are drafted in accordance with the terminology used in that part. *See* IAF, Tab 3, Subtab 6 at 69; 5 C.F.R. § 838.302(a)(2)(i) and (ii).

¶12 With respect to lifetime benefits, the Order supersedes the original divorce decree. *See* [5 C.F.R. § 838.134](#)(a)(2) (when two or more court orders relate to the same former spouse, the one issued last will be honored). In interpreting the terms of a court order which awards a former spouse a share of a CSRS annuity, OPM applies the regulations under 5 C.F.R. part 838 subpart F. *See* 5 C.F.R. §§ 838.102(4), 838.601(a). Among those regulations is 5 C.F.R. § 838.621, which provides, in relevant part:

(a) *Prorata share* means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

(b) A court order that awards a former spouse a prorata share of an employee annuity . . . by using the term 'prorata share' and identifying the date when the marriage began satisfies the requirements of §§ 838.305 . . . and awards the former spouse a prorata share as defined by paragraph (a) of this section.

Because the Order uses the term "prorata share" and identifies the date the appellant and Ms. Baker were married, OPM correctly interpreted the Order to award Ms. Baker a share equal to one-half of the fraction for which the numerator is the appellant's 273 months of Federal service while married to Ms. Baker, and for which the denominator is his 287 total months of Federal service, or 47.56

percent.⁵ Although OPM's letter of August 31, 1998, refers to a denominator of 296 months, it is evident that this was a typographical error and did not enter into the actual computation. We therefore find that it is unnecessary to remand the matter to OPM.

¶13 We note that the administrative judge did not specifically address the appellant's claims of various regulatory violations. *See Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and her legal reasoning, as well as the authorities on which that reasoning rests). In particular, the appellant objects that Ms. Baker's application for benefits was not in compliance with [5 C.F.R. § 838.221](#)(b), which requires, in addition to a certified copy of the court order, a certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside. The appellant further asserts that OPM failed to note the date of receipt on the Order, as required under [5 C.F.R. § 838.131](#)(2). We find, however, that the appellant has not shown that the alleged procedural errors were likely to have caused OPM to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991). The

⁵ OPM was also correct not to give effect to the language in the Order that purported to add 24 months of premarital military service to the numerator. Even if the appellant had in fact served 24 months in the military before marrying Ms. Baker, that portion of the Order would still be inoperative, because OPM was bound under § 838.621(b) to apply the definition of pro rata share at § 838.621(a), which requires that the numerator of the fraction used to calculate the share include only service performed while married. *Cf. Hamilton*, [114 M.S.P.R. 439](#), ¶ 17 (a former spouse was entitled to a pro rata share as defined by regulation, notwithstanding language in the court order purporting to award a 55 percent share of the appellant's annuity as of the date of separation). The factual error in the Order language is therefore of no consequence.

appellant also alleges that OPM failed to comply with [5 C.F.R. §§ 838.1004](#), 838.1008, and 838.1009; however, these regulations pertain only to court orders received by OPM before January 1, 1993, and therefore have no relevance to this appeal. *See Hamilton*, [114 M.S.P.R. 439](#), ¶ 15 n.1; 5 C.F.R. §§ 838.101(c)(2), 838.102(a)(6). Finally, because the Board lacks the authority to review the actions of the Oconto County Circuit Court, we cannot consider the appellant's claim that the court failed to satisfy its obligations under 5 C.F.R. § 838.122.

¶14 We have considered the appellant's remaining arguments and find that they are without merit. Accordingly, we affirm OPM's reconsideration decision.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT AND THE INTERVENOR REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.